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FILED

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**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

IN THE MATTER OF THE APPLICATION
OF WESTWATER FARMS, LLC FOR
ADMINISTRATIVE APPROVAL OF THE
HARELY DOME WELL 1SWD WELL
LOCATED IN SECTION 10, TOWNSHIP
19 SOUTH, RANGE 25 EAST, S.L.M.,
GRAND COUNTY UTAH, AS A CLASS II
INJECTION WELL

**DIVISION'S MEMORANDUM IN
OPPOSITION TO LIVING RIVERS'
REQUEST FOR REHEARING AND
MODIFICATION OF EXISTING
ORDER, AND IN THE ALTERNATIVE,
REQUEST FOR A STAY OF THE
ORDER ISSUED ON JANUARY 13, 2011**

Docket No. 2010- 029

Cause No. UIC-358.1

The **DIVISION OF OIL, GAS AND MINING** ("Division") through its counsel, hereby submits this Memorandum in Opposition to Living Rivers' Request for Rehearing and Modification of Existing Order, and in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 ("Request"), filed with the Board of Oil, Gas and Mining ("Board") by Living Rivers ("Petitioners") on February 1, 2011, as follows:

I) Living Rivers' Request Is Procedurally Defective and Should be Denied.

Utah Code Ann. § 64G-4-302 of the Utah Administrative Procedures Act ("UAPA") governs requests of reconsideration and Utah Admin. Code R641-110 governs administrative requests for rehearing submitted to the Board. *See also* Utah Admin. Code R641-100-500 (reserving all right, powers, and authority described in

UAPA to the Board and construing all relevant administrative rules as in compliance with UAPA). The relevant administrative rules allow a person affected by a final order of the Board to submit a petition requesting a rehearing that specifically sets forth why the Board's decision is "unlawful, unreasonable, or unfair." Utah Admin. Code R641-110-100, 200.

Petitioners have apprised themselves of this opportunity and submitted their Request stating the basis of the Request as "additional information." Request, at ¶ 2. The standard for a request based on newly discovered evidence requires that "the petition [] be accompanied by an affidavit setting for the nature and extent of such evidence, its relevancy to the issues involved, and a statement that the party could not, with reasonable diligence, have discovered the evidence prior to the hearing." Utah Admin Code R641-110-200.

Petitioners' Request should be denied as they have failed to comply with these requirements in the following ways:

- a) Petitioners' Exhibits are Insufficient Supporting Affidavits to Support a Rehearing Based on Newly Discovered Information.*

The Utah Administrative Code requires petitions for rehearing based on newly discovered evidence be accompanied by a supporting affidavit presenting and establishing why the new evidence merits rehearing. Petitioners have attached to their Request two exhibits, neither of which are sufficient affidavits.

First, Petitioners attached as Exhibit A "Living Rivers Appeal Procedure Memo" ("Appeal Memo") which "states the rights of the appellant in a matter such as a docket number 210-029." Request, at ¶ 1; Exhibit A. The Appeal Memo merely summarizes

how a party to a formal adjudication of the Board may seek judicial review of a final order of the Board. *See generally*, Appeal Memo. Aside from mentioning the Board's jurisdiction over approval of Class II injection wells, the Appeal Memo mentions no specifics regarding the Harley Dome well at the center of this matter. More importantly, the Appeal Memo does not present the requisite "nature and extent" of claimed new evidence, state how the new evidence is relevant to the proceeding, and does not include a statement as to why Living Rivers could not have discovered the new evidence prior to the hearing. *Id.* Consequently, being of extremely general nature and including none of the requisites for an affidavit to support a rehearing based on new evidence, the Appeal Memo is insufficient as a supporting affidavit.

Second, Petitioners' attached as Exhibit B a memorandum that was submitted to the Grand County Council and Grand County Planning and Zoning Commission ("Grand County Memo") in a parallel but independent conditional use permit proceeding. Exhibit B; Request, at ¶ 2. Like the Appeal Memo, the Grand County Memo also fails to satisfy the affidavit requirement for a request for rehearing.

The Grand County Memo merely summarizes the legal authority of the Grand County Council under the County Land Use Development and Management Act, Utah Code Ann. § 17-50-301 et seq., regarding the County's authority to impose conditions on the County's conditional use permit. *See*, Grand Count Memo. Not only is this analysis completely irrelevant to the Board's authority to approve Class II injection wells, it presents none of the requirements for supporting affidavit under R641-110-200. The Grand County Memo does not present the requisite "nature and extent" of claimed new evidence, state how the new evidence is relevant to the proceeding, and does not include

a statement as to why Living Rivers could not have discovered the new evidence prior to the hearing. *Id.* Consequently, failing to meet the relevant requirements the Grand County Memo is insufficient as a supporting affidavit.

Petitioners' exhibits do not constitute the necessary supporting affidavits. As Petitioners have failed to comply with the requirements for a petition for rehearing based on new evidence, Petitioner's Request is procedurally defective and should be denied.

b) In the Body of Their Request, Petitioners do Not Present or Identify any New Evidence Justifying Rehearing.

As mentioned, Petitioners state, "the basis of this request for reconsideration is additional information." Request, at ¶ 2. However, in addition to failing to present any new evidence in their exhibits, Petitioners also fail to include or present any new evidence in the body of their Request.

Petitioners state they have retained as an expert witness, Professor Kip Solomon, Chairmen of the Department of Geology, University of Utah, and are in "preliminary discussions" with him regarding the matter. Request, at ¶ 3. Purportedly, Dr. Solomon has indicated there "are additional questions that need to be examined" and that he believes "it to be prudent" the West Water Farms permit contain a condition for ground water monitoring.

However, Petitioners have not expanded on or identified these "additional questions" nor indicated why they differ from the testimony given at the hearing on December 8, 2010. The mere retention of an expert without identifying any novel or new facts or considerations does not constitute new evidence or justify granting a request for rehearing. Moreover, testimony regarding the need for ground water monitoring wells

has already been presented before and addressed by the Board at the December 8, 2010 hearing. Further hearing on the issue of monitoring conditions is duplicative and a waste of administrative resources.

This Board has already been more than generous in hearing Petitioners' grievances. Petitioners, being represented by counsel, are apprised of the relevant rules governing the timelines and presentation of testimony before the Board. Petitioners chose to not prepare and obtain an expert witness prior to the December 8, 2010 hearing. Ostensibly, Petitioners are just now preparing their case in chief that should have been prepared and executed in December. Petitioners have presented no new evidence or given any reason as to why this delay is justified or this preparation could not have occurred within the governing timeline.

Consequently, presenting no new evidence in the body of their Request justifying a rehearing, Petitioners' Request should be denied.

II) Petitioner's Request for a Stay is Unnecessary and Should Therefore Be Denied.

Petitioners ask that in the occurrence the Board chooses not to grant their Request for Rehearing, the Board issue a 30 day stay of its Order so that Living Rivers may appeal the Order to the Utah Supreme Court.

The superfluous nature of this request has been sufficiently addressed in West Water Farms Memorandum in Opposition, for administrative economy the Division joins their Memorandum for this issue.

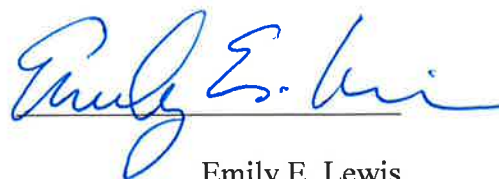
CONCLUSION

Petitioners have failed to comply with the request for reconsideration requirements of Utah Admin. Code R641-110 governing a request based on new

information. Petitioners have failed to include an affidavit presenting the “nature and extent” of claimed new evidence, stating how the new evidence is relevant to the proceeding, or including a statement why the new evidence could not be discovered prior to the hearing. Additionally, the body of Petitioners’ Request merely states they have obtained an expert witness without identifying any new or novel considerations or issues that would constitute grounds for a rehearing. Petitioners’ alternative request for a stay is also unnecessary as Board action of the Request begins a new 30 day judicial appeal period.

For the forgoing reasons the Division respectfully requests the Board enter an order denying Petitioners’ Request for Rehearing and Request for a Stay.

Dated this 22 day of February, 2011.

A handwritten signature in blue ink, appearing to read "Emily E. Lewis", written over a horizontal line.

Emily E. Lewis
Steven F. Alder
Assistant Attorneys General
Counsel for the Utah Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

I certify that on this 22nd day of February, 2011, an exact copy of the attached DIVISION'S MEMORANDUM IN OPPOSITION TO LIVING RIVERS' REQUEST FOR REHEARING AND MODIFICATION OF EXISTING ORDER, AND IN THE ALTERNATIVE, REQUEST FOR A STAY OF THE ORDER ISSUED ON JANUARY 13, 2011, was placed in the United States Mail, postage prepaid, addressed to:

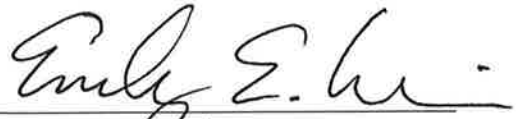
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